UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-10437-RWZ
CONSOLIDATED WITH 02-12489-RWZ

GLOBAL NAPS, INC.

v.

VERIZON NEW ENGLAND INC.
d/b/a VERIZON MASSACHUSETTS, et al.

Memorandum of Decision

May 12, 2004

ZOBEL, D.J.

Until the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 101, *et seq*., was passed, local telephone service was provided by one company throughout a given region. The Act promotes competition by encouraging and facilitating the entry of new telecommunications carriers into local service markets. It requires incumbent local exchange carriers ("ILECs") to share their networks with competing local exchange carriers ("CLECs") upon request, and to negotiate interconnection agreements in good faith. An entering CLEC can choose to opt into an existing agreement between an ILEC and a CLEC, or it can negotiate its own agreement with the ILEC. 47 U.S.C. § 252(i), § 251(a)(1). Where negotiation is unsuccessful, either party may request that a state commission arbitrate the disputed terms. 47 U.S.C. § 252(a)(2) and (b). The negotiated or arbitrated agreement must then be submitted to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission may reject the agreement only if it fails to satisfy 47 U.S.C. §§ 251 and 252(d). 47 U.S.C. § 252(e)(2).

Global NAPS, Inc. ("Global"), a CLEC, entered into negotiations with Verizon New England, Inc. ("Verizon") concerning the terms of an interconnection agreement. On July 30, 2002, Global petitioned the Massachusetts Department of Telecommunications and Energy ("DTE") for arbitration of the disputed terms. On December 12, 2002, DTE ordered the parties to incorporate its findings into a final interconnection agreement to be filed with DTE within 21 days, or by January 2, 2003. Both parties, thereafter, moved to extend the time to finalize the language of the agreement.

On December 30, 2002, Global filed suit in this Court against Verizon, DTE, and various commissioners, seeking a declaration that DTE's December 12, 2002, arbitration order is unlawful and enjoining defendants from enforcing it (Civil Action No. 02-12489-RWZ). A few weeks later, Global informed DTE that it would adopt the terms of another interconnection agreement between Verizon and Sprint Communications L.P. ("Sprint Agreement"), which existed before Global entered into the arbitration, instead of finalizing the arbitrated agreement. The next day, Verizon filed a Motion for Approval of Final Arbitration Agreement or, in the Alternative, for Clarification, in the DTE proceeding. Global opposed.

On February 19, 2003, DTE rejected Global's proposal absent Verizon's consent. DTE determined that 47 U.S.C. § 252(i) does not allow a CLEC to avoid an arbitrated agreement by opting into a more favorable agreement for the following reasons: (1) DTE's arbitrated decisions are final and binding on both parties, and (2) public policy dictates the arbitrated agreement be upheld to provide incentive for the CLECs to negotiate in good faith and to conserve administrative resources. With specific reference to this case, it determined that the incorporation of Section 252(i) into the

arbitrated agreement does not allow Global to opt into another agreement at any time. DTE approved Verizon's agreement, which incorporated the terms of the arbitration, and directed the parties to sign the approved arbitration agreement within seven days.

Global then filed the present suit on March 6, 2003, against Verizon, DTE and various commissioners, contesting DTE's February 19, 2003, order. More specifically, Global seeks to set aside the order and opt into the Sprint Agreement. This action was consolidated with Civil Action No. 02-12489-RWZ. All parties have moved for summary judgment. Global contends that DTE erred by insisting on the finality of its arbitration award and in its interpretation of the Act. Both Verizon and DTE argue that the February 19, 2003 order is entirely consistent with the Act. The parties agree that jurisdiction is proper under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331.

Global asserts that under 47 U.S.C. § 252(i), it has a right to adopt the Sprint Agreement at any time. That section provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

On its face, Section 252(i) says nothing about temporal limits or the inability of a CLEC to adopt a pre-existing agreement instead of an arbitrated one. However, 47 C.F.R. § 51.809(c) provides that individual interconnection arrangements shall remain available to CLECs "for a reasonable period of time after the approved agreement is available for public inspection. . . ." Global protests that DTE did not rely on the passage of a reasonable period of time, and it is not clear that the time had, in fact, run. The argument mixes apples and oranges. DTE clearly held that Global's choice was

curtailed not by the expiration of time, but by its decision to arbitrate:

> As Verizon points out, the Sprint Agreement was available to [Global] for adoption before [Global] filed its petition for arbitration and, at any point prior to the issuance of our final Arbitration Order, [Global] could have chosen to adopt the Sprint Agreement. But once our final Arbitration Order was issued, the adoption process under § 252(i) was not a lawful option in order to comply with the arbitrated decision.

(Global's Appendix Tab 1 at 13-14). That is a reasonable and correct interpretation of the statute. See Southern New England Telephone Co. v. Conn. Dept. of Public Utility Co., 285 F. Supp. 2d 252, 254 (D. Conn. 2003) ("An entering CLEC can *either* opt into an existing interconnection agreement between the [incumbent] LEC and another CLEC, *or* it can negotiate [and arbitrate] its own interconnection agreement.") (emphasis added).

Global further attacks DTE's strict insistence that a CLEC's choice of one process forecloses another one. It contends that "[b]oth by its terms and its intended effect, Section 252(i) assures that regardless of the outcome of any particular negotiation or arbitration, all CLECs remain on equal footing." (Global Mem. at 15). Therefore, Global concludes that under § 252(i), "if an arbitration results in unfavorable terms for the arbitrating CLEC, it can adopt its competitor's terms." (Global Reply at 9). Global's interpretation of the terms and the intended effect of Section 252(i) is far too broad. Section 252(i) does not guarantee that all CLECs will obtain comparable terms in their interconnection agreements; that purported goal is inconsistent with the goal of the Act, which is to promote competition among the carriers. Section 252(i) merely provides CLECs with the opportunity to opt into an existing agreement – an opportunity that Global did not take.

Global next asserts that Section 252(i) allows a CLEC to amend its interconnection agreement to include the more favorable terms of another agreement. However, it fails to note that it is not a party to the other agreement and cannot, therefore, force an amendment thereto. Instead, Global is attempting to avoid the agreement it arbitrated by opting into another one – an altogether different proposition, which is not discussed in the language of Section 252(i).[1]

Global also states that a CLEC, unlike an ILEC, is not obligated to accept the arbitrated agreement. In this it is supported by the asymmetrical nature of the Act which imposes obligations on the ILECs only. However, both Global and Verizon cite to the Federal Communications Commission's ("FCC") Local Competition Order, which states that:

> We reject SBC's suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding. . . . We also believe that, although competing providers do not have an affirmative duty to enter into agreements under Section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith. Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to expand [sic] resources in arbitration if the requesting carrier does not intend to abide by the arbitrated decision.

(Global's Appendix Tab 4 at ¶ 1293). The FCC clearly states that the arbitration order is binding on *both* parties. Furthermore, under Section 252(b)(5), Global's refusal to cooperate with the arbitrator's order constitutes a failure to negotiate in good faith. See 47 U.S.C. § 252(b)(5) ("The refusal of any other party to the negotiation. . . to cooperate

[1] Because Global is not a party to the arbitrated agreement, there is no need to address DTE's statement concerning Global's inability to void an existing contract in favor of a better contract.

with the State commission in carrying out its function as an arbitrator. . . shall be considered a failure to negotiate in good faith."). Therefore, enforcement of the arbitration order is an entirely appropriate penalty and serves as a disincentive for a CLEC to force an ILEC to arbitrate an agreement while reserving the right to withdraw if it does not like the outcome.

Finally, DTE correctly ruled that permitting Global to ignore its arbitration decision would waste DTE's limited resources and impose an unnecessary burden on Verizon. Global asserts that resources would be saved by allowing it to adopt the Sprint Agreement now instead of having to appeal the arbitration order. However, DTE has already expended resources with the arbitration. Global's statement that "[r]esources are not wasted in arbitration even though some of the contract terms established through arbitration may never be used" is completely untenable. (Global Reply at 9). Global's final argument that "there is no realistic basis for any concern that CLECs will waste DTE and Verizon resources with unnecessary arbitrations" is belied by this very suit. (Global Mem. at 20). Insofar as Global is contending that the arbitration order is discriminatory, it has a remedy in the suit concerning the merits of the order.

Accordingly, Global's Motion for Summary Judgment is DENIED and the motions by Verizon and DTE are ALLOWED.

_____ /s/ Rya W. Zobel
DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE